POLICY FORMULATION OF THE CRIME OFFENSES AGAINTS RELIGION AND RELIGIOUS LIFE IN THE EFFORT OF INDONESIA NASIONAL PENAL CODE REFORM

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ABSTRAK

Pasal 156a KUHP yang dikategorikan "Tindak Pidana terhadap Agama" (offenses againts religion), perlu reformulasi karena perumusan normanya masih terlalu umum dan multitafsir, yaitu kata "permusuhan, penyalahgunaan dan penodaan". Sedangkan kata "agama" sebagai kata benda hukum abstrak, perlu rincian yang menjadi objek penghinaan, yaitu Tuhan, Rasul, Nabi, Kristus, Awatara, atau tokoh-tokoh suci dari agama yang dianut di Indonesia, Kitab Suci atau ibadah keagamaan, seperti yang dirumuskan di Massachussets, Pakistan, dan Yunani. Pasal 156a, huruf (a) KUHP bisa direformulasikan menjadi beberapa pasal: (1) Tindak Pidana terhadap Agama secara umum (di beberapa negara disebut "Outrage to Religious Feeling and Insult to Religion"), yang objeknya perasaan keagamaan; dan (2) Tindak Pidana terhadap Agama yang objeknya langsung ditujukan langsung terhadap pokok-pokok ajaran agama (di beberapa negara disebut "Blasphemy"). Selain itu, dalam KUHP ada pasal-pasal yang dapat dikategorikan "Tindak Pidana terhadap Kehidupan Beragama" (offenses related religion) , yaitu Pasal 175-177 ayat (1) dan (2) dan 503 ke-2, namun belum diatur tindak pidana Perusakan Bangunan Tempat Ibadah. Padahal secara sosiologis, kejahatan ini dari tahun ke tahun terus meningkat di Indonesia. Di beberapa negara sudah diatur tindak pidana perusakan tempat-tempat ibadah dan benda-benda sarana ibadah, antara lain India, Pakistan, dan Israel, bahkan kriminalisaisi atas perbuatan ini berakar pada budaya bangsa Indonesia sendiri, terbukti telah diatur dalam Canto 55 Undang-undang Ādigama Majapahit. Dari segi sanski, pasal-pasal yang digolongkan "tindak pidana terhadap kehidupaan beragama" dalam KUHP, apabila dibandingkan dengan negera-negara lain, tergolong sangat ringan, sehingga tidak lagi memenuhi rasa keadilan masyarakat. Berat atau ringannya sanksi yang diterapkan untuk Tindak Pidana ter-hadap Agama dan Kehidupan Beragama di beberapa negara, tidak dapat dilepaskan dengan filosofi masing-masing negara yang melatarbelakangi perumusan tindak pidana tersebut. Pada umumnya negara yang manganut teokrasi, seperti Pakistan, menjatuhkan pidana yang lebih berat dibandingkan dengan negara-negara sekuler. Untuk tindak pidana perusakan tempat Ibadah dan benda yang digunakan dalam beribadah, jenis sanksi ganti kerugian relevan diterapkan, khususnya ditinjau dari perspektif korban kejahatan. Meskipun RUU KUHP Konsep 2010 sudah mengatur tindak pidana perusakan tempat ibadah (Pasal 348), namun sanksinya belum memenuhi rasa keadilan, khususnya secara victimologis dari kepentingan korban kejahatan.

Kata kunci: Kebijakan formulasi, Tindak Pidana terhadap Agama dan Kehidupan Beragama, Pembaruan KUHP Nasional.

I. INTRODUCTION

1.1. Background

Since its establishment, Homeland is in two state relations and religious paradigms, namely the paradigm of integration, which gave birth to the state religion *(theocracy),* and that paradigm sekularistik spawned neutral secular state religion *(Secularism).* First principle of Pancasila to clearly determine the direction of the nation's next trip, do not choose a theocratic state based on a particular religion, as opposed to the reality of a pluralistic nation of Indonesia, the reverse is not a secular state, as opposed to the religious character of the Indonesian nation. Synthesis between the two extreme poles paradigms relation of state and religion, finally gave birth to the concept of state ideology.[1] Based on the paradigm of symbiotic the Seminar National Law I of 1963 initiated the need for specified offenses faith in the criminal law, so that, UU Number 1/ PNPS/1965 on the Prevention of Abuse and/or blasphemy (UUPNPS). Article 4 of PNPS reads:

> In the Book of Penal Law (KUHP) held new article which reads as follows: "Article 156a". Shall be punished with imprisonment for ever five years whoever intentionally publicly issued feelings or acts: 1. Which in principle in hostility, abuse or desecration of religion in Indonesia; 2. with the intention that peuple do not subscibe to any religion, which based belief in God Almighty.

Before "chapter amendment" is not recognized crime offenses against religion, although there are some articles in the KUHP are included in the category of offenses relating to religion. Since concept draft of Nasional Penal Code (RUU KUHP) 1993 and the newest draft of the RUU KUHP 2010, both types of crime that is known as the Crime of Religion and Religious Life. Based on the two categories above, then in the Criminal Code which now prevail, Crime against religion under Article 156a and Crimes against Religious Life is scattered in Article 175-177 and Article 503-2 of KUHP. Although the philosophy underlying the formulation of the offense against the idea of religion in UUPNPS is ideal, but its implementation in the life of the nation was not mudah. Hal is evident from the difficulty in determining the boundaries of the state interference in religious life.[2]

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[1]As'ad Said Ali, *Negara Pancasila Jalan Kemashlahatan Berbangsa* (Jakarta: LP3ES, 2009), pp. 157-159.

[2]Barda Nawawi Arif, *Kebijakan Hukum Pidana: Perkembangan Penyusunan Konsep KUHP Baru* (Jakarta: Prenad Media Group, 2008), pp. 323.

Based on the above description, it still needs to be clarified as well as to what is meant by "desecration of religion" in Article 156a. The word "hostility", "abuse", and "desecration" does have meaning evil contained therein, which is associated with deliberately spreading hate (hate speech) as the reason for the criminalization of such measures in the act. But given that the word "religion" in the phrase "defamation of religion" is "objects of the law" that are abstract or abstract, then the object of penodaannya to be explained, for example, against God, Christ, Avatara, Prophets, Apostles, Holy Bible, and so on, as which is set in Massachusetts and Pakistan, which is also found in the RUU KUHP 2010.

However, in these countries only prioritize protection against one of the state supported religion, in this case Islam in Pakistan, and the Christian/Catholic in Massachusetts. In contrast to the pluralistic Indonesian society, which is the object of protection should be more neutral, ie elements that are recognized in all religions, such as an affront to God, Christ, the Apostles, Avatara, Nabi (Prophet), Scripture, and so on. Furthermore, in relation to an offense against the life of religion, the Criminal Code has not been set on the criminal destruction of places of worship and places of worship, which ironically tends to increase lately. During this time, the destruction of places of worship subject to Section 410 of KUHP concerning the destruction of buildings owned by someone else. Assume equal perbutan damaging place of worship with the destruction of buildings owned by someone else, of course, does not fit the culture of Indonesian society is very religious. Because the destruction of people's property, then the aggrieved was limited to its owner, but damaging the mosque, temple or church, then that tainted are all Muslims, Hindus, Christians and Catholics around the world, which is certainly not comparable to the loss of material sheer.

As a comparison, the crime of destruction of places of worship was already criminalized in other countries, yaituIndia, Israel, and Pakistan, also proved that even our nation that upholds the values of pluralistic society in accordance with sesanti "Unity in Diversity" , it has been criminalizing destruction of places of worship and objects of worship, more than 700 years ago. Evident from Canto 55 of *Sang Hyang Ādigama* from Majapahit Kingdom era, which has been set and the penalties more severe than the destruction of the building of others and public facilities, namely a fine of 24,000 *Pisis* and criminal restitution to restore the damage to normal (*danda maliha becik malih*). Weighting of criminal destruction of places of worship compared to ordinary buildings, in contemporary times can be compared with the formulation of Section 295

IPC and Section 295 PPC, "destroy, damage or defile the place of worship, or objects considered sacred by a group of people in these religions with the purpose insulting religion ", punishable by a maximum of 2 years imprisonment descriptions, or fine, or both"), is heavier than the destruction of buildings owned by someone else. Based on the above, it is clear that not Crime against religion and kehiodupan religion in UUPNPS and KUHP still contains some weaknesses that need to be improved:

First, it should be specified Article 4 UUPNPS jo. Article 156a of KUHP which became the object of contempt of religion, such an affront to God, the Prophet, and the Holy Scriptures. But because of the definition of each religion on objects desecration is different, it is necessary formulations clearly *(lex certa)* that emphasizes the protection of religious feelings and peace of the people, not the protection of religious concepts such as the *theocracy*; *Second*, the persistence of the legal vacuum in terms of actions and the destruction of places of worship means to worship in Indonesia continues to increase, due to the lack of criminalization of this crime. Criminal damage places of worship with more severe sanctions this, as "lex specialis" of the offense provided for in Article 410 of KUHP.

1.2. Problem Formulation

Based on the background described above, can be formulated 2 problem formulation as follows:

1. How the formulation of norm for the Crime of Religion and Religious Life in the reform of the National Penal Code of Indonesia?
2. How the formulation of sanctions for the Crime of Religion and Religious Life in the reform of the National Penal Code of Indonesia?

1.3. Research Methods

Research used in the writing of this dissertation is the study of law doctrinal *(Doctrinal Research)*, which is particularly reflected in the efforts inventory of positive law, and the effort of finding the principles and basic philosophy (dogma and doctrine) that lie behind them. Inventory of positive law here means the legislation is written, ranging from Indonesia Contitution (UUD 1945), namely Section 28A Number (2), Article 28J Number (2), and Article

29 Number (1) and (2) as the constitutional basis that the State based upon The belief Almighty and its implementation in religious freedom and human rights. Subsequently, from perpsektif rights restrictions allowable *(permissible resctriction)* as stipulated in Article 18 paragraph (3) and Article 20 paragraph (3) of Act Number 12 of 2005 on the ratification of the ICCPR, the basis of state involvement in the conduct restrictions of freedom of states of mind that can lead to disharmony society.

To further expand the horizon of this study, the authors will compare well with the formulation of norms and sanctions offenses against religion (ofenses againts religion) in other countries, namely Massachusetts and Pakistan. While the formulation of norms and sanctions offenses Religious Life (ofences related religion), will be compared with India, Pakistan, Greece and Israel. Regarding the criminal destruction of places of worship, will be compared with India, Pakistan, Israel and The Act of *Ādigama* Act from the time of Majapahit. Comparison with the old code, in addition to comparisons with modern states, was to find a law that truly reflects the *"rechtside"* (ideals law) Pancasila, as the basis of strong historical, because of the great value has been practiced by the nation of Indonesia own in the trajectory of history for centuries. The approach in the above study also called legal approach normative. In the Dutch Legal literature, legal research is called "scientific study of law". The term "assessment" (Dutch: "*Bedrijven*", or "*beoefening*") is also used J.J.H. Bruggink: *"het Bedrijven van de recht wetensschap"* (the study of jurisprudence), [3] or in terms of January Gissels and Mark van Hoecke *"wetenschaps boefening"* and *"de beoufening van de rechts Theorie"* (study of legal theory).[4] Research the law does not recognize this as field research, because under study are of legal materials, so it can be said to be "based libraries, focusing on reading and analysis of primary and secondary materials".[5]

Besides Statute Approach, this dissertation study will also use the conceptual approach, Historical Approach, and the Comparative Approach are complementary. Historical Approach will help to understand the philosophy of the rule of law from time to time, as well as change and

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[3]J.J. H. Brugink, *Refleksi tentang Hukum* (Bandung: Penerbit PT. Citra Aditya Bakti, 1999), pp. 138-139.

[4]Johnny Ibrahim, *Teori dan Metodologi Penelitian Hukum Normatif* (Malang: Bayu Media Publishing, 2008), p. 46.

[5]*Ibid.*

development philosophy underlying".[6] Through the Comparative Approach will then be compared to the laws in force in Indonesia with the laws of other countries, in this case the crime is the formulation of Religion and Religious Life in India, Pakistan, Israel, and Masachussets. While the development of the law from time to time, will be compared with the ancient law of the Indonesia itself, namely The Code of *Ādigama* of Majapahit.[7] By comparison of the law of a country to another, or the law of a particular time with the law of another time, hopefully helping to further explore the background of the specific laws for the same problem from two different countries, both legal systems and sociocultural community. While Conceptual Approach will be used to sharpen the understanding of the concept of separation of powers between religion and state are commonly applied in Western countries and the concept of unification of the state and religion in Islamic theocracy. Deep understanding of the two paradigms relations of state and religion, is expected to further understand the boundaries of state and religion in the concept of Rule of Law *Pancasila*, which is "not a religious state", but also "not a secular state". In addition to the approaches described above, eventually approach law (Statute Approach) is done by reviewing the law that has to do with the legal issues that are being investigated.

Legal materials were obtained, both legal materials of primary, secondary, or tertiary, further processed and analyzed qualitatively with a model of a deductive approach that can explain the legal issues raised. Legal materials processing is done by the method of interpretation. This method is usually used in the context of legal discovery, by way of interpreting the text sound legislation, in this case UUPNPS, the articles of KUHP that relates to this dissertation research (Article 156a, Section 175-177, and 503 to-2), and RUU KUHP Concept 2010 (Article 341-148) as a comparison. Especially the author refers to the modern interpretation (modern interpretation), to facilitate the identification of the elements that form a context in question. McLeod also said the two subjects in modern interpretation, namely the laws and language. Thus, interpretation of the law will be used to analyze the articles offense religion and religious life for the better defines the boundaries of "defamation of religion" in relation to the theme of this dissertation research.

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[6]Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Prenada Media Group, 2005), p. 126.

[7]*Sang Hyang Adigama*. Transliteration of Ancient Javanese by P.J. Zoelmulder, SJ. Collection of Library "Artati", Map. 75, Catholic University "Sanata Dharma", Yogyakarta (Original manuscript kept in the library of Leiden, MS.Or. 3878-1).

Further comparisons with other countries, namely Pakistan, India, Masacussets, and Israel, though derived from the same era, but the distance spanned different space: both from a social situation, political, religious and cultural laws, the interpretation of this language would understand the legal terms used in accordance with its original context. In contrast, the comparison with the Majapahit Act, despite having the same historical roots with Indonesia now, but because it was already hundreds of years old, then the interpretation of this language is needed. Rarely space and time varying, according to the terms Ian McLeod, will give birth to *"a different grammatical form",* [8] because it needs to be bridged by placing a semantic context. McLeod stressed the need for preambles in interpreting the law. The preambles according to McLeod in Indonesian legislation parallel with "menimbang" (considering), which contains the reasons the enactment of a law. [9]

II. Theoretical Framework

2.1. Theory of the Relation between State and Religion

In the theory of the relation between religion and the state, there are three interrelated paradigms, namely: Integration Paradigm that brings together state and religion *(Einheif von Staat und Kirche)*, Secular Paradigm that completely separating between religion and the state (English: *"Separation of Church and state"*), and Symbiotic Paradigm who view religion and state is not unified but need each other, and not mutually exclusive. Based on the facts of sociocultural diversity of Indonesia, the Pancasila state system model adopted symbiotic paradigm, which views religion and state need each other, but with the understanding that the religious beliefs in the country not formally as happened in the theocracy. Crime related to the Religion and Religious Life, which deals with the theory is the theory of religious protection *(Religionsschutz-Theorie)*, the theory of protection of religious feelings *(Gefuhlsschutz-Theorie)* and the protection of religious peace *(Friedensschutz-Theorie)* are interrelated, because tarnish the sanctity of religion by attacking the main points of belief religious beliefs religious feelings of believers tarnish.[10]

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[8]Ian McLeod, *Legal Theory* (Macmillan: Plagrave, 2007), pp. 132-133.

[9]Peter Mahmud Mazuki, *Op. Cit,,* pp. 117-118.

[10]Barda Nawawi Arief, *Delik Agama dan Penghinaan Tuhan (Blasphemy) di Indonesia dan Perbandingannya di Beberapa Negara* (Semarang: Badan Penerbit Universitas Diponegoro, 2007), pp. 2-3.

On one hand the assertion that Indonesia "not a religious state" means the state should not be too much interference in religious matters, to determine whether or not a conviction, because it includes the private sphere *(internum forum)* are outside the domain of the state. But on the other hand, "is not a secular state" means that the state is not neutral at all religion, state must also protect and guarantee the citizens to freedom of religion, and express their religious beliefs. But when religious belief was expressed to others, then it comes to the rights of others as well *(externum forum)*, then within certain limits, the state can intervene to protect religions from insults, which if not regulated at all would disrupt people's lives. In the search for a "modus vivendi" between theocracy and the secular state, Pancasila, as proposed by Soekarno, dated June 1, 1945, it was agreed as the nation. On one hand, Homeland is not a "state religion" which is based on the basis of religion, and the other party also rejected the "secular state", because it is accepted precepts "Belief in God Almighty". Not God according to one religion, but the Divine principles that give space and protect all religions are different, as confirmed Soekarno. Principle "Belief in God Almighty" that philosophal religiously overshadow all the different religions is, in the days of Majapahit implemented in the administration of the country, especially in legal politics. Referring to the concept *de Nationale Staat* (National State) is not based on a particular religion, proved that at the time it was already known that high office in charge of the so-called "Minister for Hindu people" *(Dharma-dyaksa ring Kasyaiwan*), "minister for Buddhis pepole" *(Dharmadyaksa Kasogatan ring)*, and a religious community called *Karesyan* – perhaps parallel to "Penghayat Kepercayaan" (a folk religion) – is under a separate officer.[11] The third community by Mpu Prapanca (1361), called Tripaksa, which is the respon-sibility of the king to "strengthen the rights and obligations in the archipelago" (*Negara Krtagama* LXXX, 1).[12]

Ahead of Indonesia's Independence, the State required that can unite two growing aspirations of the time, namely that wants an Islamic state, and the other requires a neutral state religion. Besides thinking Soekarno, Mochamad Hatta wills clicking secular state that separates religion and state *(Scheiding van Kerk en Staat),*[13] while Soepomo, also requires the

[11]Muhammad Yamin, *Tata Negara Madjapahit. Sapta Parwa.* Jilid IV (Djakarta: Penerbit Jajasan Prapantja, 1962), pp. 248-249.

[12]I Ketut Riana, *Kakawin Desa Warnana utawi Negara Krtagama: Masa Keemasan Majapahit* (Jakarta: Penerbit Kompas, 2009), p. 153.

[13]RM. A.B. Kusuma, *Lahirnya Undang-undang Dasar 1945* (Jakarta: Penerbit Universitas Indonesia, 1009), pp. 118, 128.

separation of religion and state, "... but it does not mean that the state is areligious ".[14] So, although Soepomo asserted that the Islamic state is not appropriate choice, because "there will be questions minderheden, about religious groups that are small, Christian denominations and others",[15] but Supomo through the Ministry of Justice, the state not only regulates the judiciary , about the prison, but also helped set up the problem of religious issues. This idea later accommodated by the formation of the Ministry of Religious Affairs. But because Indonesia is not an Islamic state, the ministry is only in certain limits could intervene in religious life in Indonesia.

2.2. Theory of State Law

Constitution of a democratic country should follow the formulation of basic rights *(constitution based on human rights),*[16] including in daamnya religious freedom, to convey thoughts, including express beliefs must also be viewed from the perspective of human rights, in the context of the organization of living together in society, especially in a pluralistic Indonesian Society. Within this context, in addition to the UUD 1945 and Law Number 39 Year 1999 on Human Rights, Indonesia has also ratified international instruments, such as Law Number 12 Year 2005 on Ratification of the ICCPR, and Law Number 29 Year 1999 on Ratification ICEFRD 1965. On one aspect, freedom of thought, conscience, religion and belief is part of the most important rights, which are non-derogable rights or may not be reduced, but on the other hand, freedom of religion should also be noted that in practice religion is often misused to trigger intelerance, discrimination, hatred religion, and violence. According to Article 20 (2) ICCPR: *"Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shal be prohibited by law".*[17] Besides guarantees freedom of religion, the UUD 1945 also contains restrictions are allowed in order to protect the human rights of others and public order.

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[14] *Ibid,* pp. 129-130.
[15] *Ibid,* p. 130.
[16] A.V. Dicey, *Pengantar Studi Hukum Konstitusi* (Bandung: Penerbit Nusamedia, 2007), pp. 67-68.
[17] Tore Lindholm, et. all. (ed.), *Kebebasan beragama atau Bekeyakinan: Seberapa Jauh?* Translated by: Rafael Edy Bosco and Rifa'i Abduh (Yogyajarta: Kanisius, 2009), p. 746.

2.3. Theory of Justice

Justice can be divided into common justice and common fairness khusus.Keadilan is thorough and perfect virtue and which must be implemented in the public interest, while the special justice that aims to realize the virtue of size in relation same-manusia.Kebajikan deeds are realizing the midpoint between the lot and the little, through similarity or proportionality. Special justice differentiated into 3 kinds: (1*) Iustisia Distributiva* is justice in the society regarding the relationship publiekrechatelijk State. (2*) Iustisia Cumutativa*, where achievement is justice in equal value with contra, together with remuneration services. Keadlian is true in the field of civil law nexus: the exchange, in the contract. (3) *Iustitia Vindicativa* applies to the field of criminal law, for each given sentences and fines in accordance with the obligations of the crime or offense committed. [18] In addition to these three kinds of justice set forth above, Joseph Pieper adds also a fourth type of justice, namely *Iustitia Protectiva* (Justice Protectif). Protective justice is justice that gives shelter to everyone. Someone needs to be protected not only his freedom to create *communia boma* (general welfare), so that the more advanced society and culture for the benefit of their members, but the public is also required to protect individual human being that each is not treated arbitrarily by anyone and by any class of society purpose screw holding nations seeking order and prosperity for all.

In implementing the principle of Justice Protective *(Iustisia Protectiva)* or human power human society and others should be limited.[19] In addition, Max Umbreit develop ideas Restorative Justice, which only emphasizes tifsk abstract violation of the state law, but oriented to korbanyang most direct contact with the impact of crime, community members and actors - therefore, encouraged to air active role in the justice process. Relevance criminal restitution payments to the victim, in this case in line with the one purpose of Restorative Justice, the healing (the ultimate aim of restorative justice is one of healin), as claimed by Joy and Sue Wundersitz Htesel: *"Through the acceptance of reparations right, the losses suffered by the victim is given, and the repair of damage, the perpetrator can be reconciled with the victim, and*

[18]O. Notohamidjoojo, *Soal-soal Pokok Filsafat Hukum* (Salatiga) Penerbit Griya Media, 2013), pp. 125-126.

[19] *Ibid,* pp. 124-126.

integrated back into society and family environment, and it was reached through reconciliation and reintegration, and community harmony can be restored".[20]

2.4. Theory of Penal Policy on Criminalization

Penal policy is part of a political criminal and penal law politics synonymous with crime prevention. According to Mac Ansel "Criminal policy is the rational organization of the crontrol of crime by society".[21] Criminal policy in the broadest sense, is the overall policy of criminal policy through legislation and official bodies which aim to uphold the central norms in society. Therefore, crime arrest can be reached by a policy approach, which includes integration between criminal and social politics, as well as the integration of crime prevention efforts are penal and non penal. If the various ways to control negative actions are not public, the new "criminal" enabled the "ultimum remidium" to tackle crime, through criminalization and de-kriminalisasi. In this regard, M. Cherif Bassiouni said that of the factors that must be considered in performing criminalization and decriminalization, are as follows:

Decision to criminalize and decriminalization must be based on the policy factors that certainly take into account factors, including: (1) balance method used in relation to the achievement of results; (2) cost analysis of the results in relation to the achievement of the objectives achieved; (3) between the assessment objectives to be achieved in relation to human resource capacity to do it; (4). social impact of criminalization and decriminalization in the context of the secunder effect. Problems of policy oriented approach is the tendency to be pragmatic and quantitative, and may not enter the factors associated with the development of values into the decision-making process. Nevertheless, policyoriented approach should be considered as one of the scientific device and is used as an alternative approach to a consideration of the values that are emocional (the emotionally laden valkue judgment approach) by the legislature. According to Bassiouni, the development of a police oriented approach is slow coming because the legislative process is not yet ready for this approach. As a result, often without the ongoing criminalization based on careful judgments and without evaluation of the effects on the whole system, could result in: (1) the crisis of over-

[20]Joy Wundersitz and Sue Hetzel, "Family Conferencing for Young Offenders: The South Australian Experience" in Joe Hudson, et. all. (ed.), *Family Group Conferences: Perspective on Policy and Practice* (new York: The Federation Press, Inc., and Criminal Justice Press, 1996), pp. 113-114.

[21]Marc Ansel, *Social Defence: A Modern Approach to Criminal Problems* (New York: Schocken Books, 1965), p. 209.

criminalization; and (2) the crisis of overreach of the criminal law. The first is due to the abundant amount of crimes and acts criminalized, and the second act of the control efforts by not using criminal sanctions really effective.[22]

2.5. Theories of punishment and Sentencing Purposes

In the literature of criminal law, known 3 (three) school of criminal law, namely the *classical school ,* positive flow or modern *school)* and the neoclassical flow *(neoclassical school).* The third school has the nature and characteristics of each, according to the background of the times with the philosophy that influence it. Based on the Indeterminism philosophy, classical Scholl view that humans as creatures has free will, therefore humans must account for his actions. This scholl emphasizes that role of crime, not the criminal. In contrast, Modern School based on the philosophy of determinism, emphasizes that human action is more influenced by the environment, not because of free will. Therefore, no criminal liability based on perpetrator fault, but rather the nature of the dangerous *(dangerreux etat).* Forms of action are more perpetrators accountable for the protection of society. Neoclassical school has the same base with the classical flow, namely the starting point of free will, but later influenced the development of modern school. According to the school, resulting from criminal classical flow is too heavy and undermine the principle of humanity. Neoclassical school improvement over the classical theory is based on a formulation of criminal justice policy with a minimum and maximum principles and recognize mitigating circumstances.

If the theories of punishment that focus attention on the criminal offender based on the philosophy of determinism and indeterminism, then the theory of punishment that will be described here focus attention on the victims of crime are based on restorative Justice as its philosophical basis, as has been previously defined. Development of thinking about punishment lately is moving towards a new orientation, that sees the completion of the criminal case is a matter that should benefit all parties. Thus, in this case the intended victim of the crime are people, and if there is no indiividu which can be identified as a victim, then the form can be directed to the public improvements.[23] In relation to criminal offenses against religion and religious areas of life, then that becomes the victim of a crime in this case is faith. In this

[22]Teguh Prasetyo, *Kriminalisaisi dalam Hukum Pidana* (Bandung: Penerbit Nusa Media, 2010), pp. 137-138.

[23] Eva Achjani Zulfa dan Indriyanto Seno Adji, *Pergeseran Paradigma Pemidanaan* (Bandung: Penerbit Lubuk Agung, 2001), p. 59.

regard, there are three (3) terminology is often used in a similar sense, the reparations, restitution and compenzation, in application tends to be realized as financial compensation, known as compensation and commonly referred to as a form of reparation, or all at once translated also as a form sentencing.[24] In the perspective of customary law, the elements of justice which apply to both criminals and victims, and protection of the public, equally attention. In Code of *Kutaramanawa* of Majapahit has been known criminal restitution called *panglicawa, patukucawa* or *pamidara* (replace losses due to damage), and additional criminal *patukutamba* or *patukujampi* (drug purchase compensation).[25] In this dissertation research, Theory of Punishment purpose knife used in the analysis examines the problem formulation the sanctions for the against Religion and Religious Life, which combined theory that emphasizes retaliation, deterrence, deterrence, treatment, socialization for criminals, and the protection of society, as well as restitution for victims. Criminal restitution is proposed as an additional punishment imposed for criminal damage places of worship, which is to repair the damage caused by the offense.

III. RESULT AND DISCUSSION PROBLEM

According to the presenting problem, the results of the study and discussion of this dissertation as follows:

3.1. The Norm Formulation of Crime against Religion and Religious Life in the National Penal Code *(Ius constituendum)*

The terms "hostility, abuse and desecration" in Article 156a of KUHP is ambiguous, because it must be improved formulation of the norm, while the word "religion" in the "desecration of religion" is a noun law that is abstract, because it was necessary details affront to religious objects, which includes "God, Apostle, Prophet, Christ, Buddha, Awatara, holy figures of religion in Indonesia, the Bible, or religious worship", as formulated in Massachusetts, (Statute 272 section 36 Massachussets General Law), Pakistan (Section 295-A and 295-C Pakistan Criminal Law), and Greece (Article 198 and 199 Graece Penal Law). Furthermore, the

[24]Mark Umbreit, "Avoiding the Marginalization and McDonalization if Victim-Ofender Mediation: A Case Study in moving Toward the Mainstreem" in Gordon Bazemore and Lode Walgrave (ed.), *Restorative Juvenile Justice: Repairing the Harm of Youth Crime* (New York: Criminal Justice Press, 1999), p. 213.

[25]Slamet Muljana, *Perundang-undangan Madjahit* (Djakarta: Bhratara Karya Aksara, 1967), p.p. 20-23. Original text of the Code in Old Javene, see: D.D. Huet, "Wetboek van Kutara Manawa" – Leiden: Leiden Universiteit, without year).

consequences of inclusion "crime against Religious Life" should be regulated separately, in terms of the formulation of norms, Articles 175-177 of KUHP should be refomulasi, where protection against religious activity or religious ceremony must be arranged separately with the disruption of the burial ceremony, including disruption of public order. In addition, there is still a legal vacuum because there dikrimiknalisasikan destructive acts of worship places and objects used in ibadah. In addition, there is still a legal vacuum because the damage has not been criminalized acts of worship places and objects used in worship. For comparison, this despicable act has been formulated as a separate criminal offense in India, Pakistan and Israel. Even in Indonesia, more than 600 years ago, the very act of wounding the religious sense, is used as a separate offense in Canto 55 of *Sang Hyang Ādigama* of Majapahit.

Based on the above considerations, proposed a concept formulation "Crimes against Religious Life" in the National Penal Code which will come as a better reformulation of Articles 175-177 and 503-2 of KUHP. As described earlier, that in many cases the destruction of places of worship is usually very nuanced political, and the actors in the field are those who are also victims provocation. Although applied in different cases, in some countries already known models of compensation to the victims. In Japan set in the Basic Act in Crime Victims, in Australia set the Victims Compensation Fund, applied to the case of rape. While in Indonesia, the state of compensation to victims and their heirs, recently applied to the victims of gross human rights violations, as stipulated in Article 35 of Law No. 26 Year 2000 on Human Rights Court further stipulated in Government Regulation No. 3 of 2002 on Compensation, Restitution and Rehabilitation of Victims of gross human rights violations.

3.2. The Sanctions Formulation of The Crime against Religion and Religious Life in the National Criminal Code *(Ius constituendum)*

The formulation of sanctions for the crime against religion in Article 156a of KUHP was formulated in Single Stelsel can be maintained, no need diaternatifkan with the imposition of criminal penalties in the bill such as the Criminal Code. While the crimes that can be classified as "Crimes against Religious Life", when compared with other countries as very light, which is to type "misdrijven" lightest imprisonment of 1 (one) month 2 (two) week or a maximum fine of Rp. 1,800, - (Article 176), and the highest imprisonment of 1 (one) year 4 (four) months

(Article 175), while for the type of "Overtredingen", the only crime associated with disorders of religious life was threatened with imprisonment for a maximum of 3 (three) days or a fine of Rp. 225, - (Article 503-2). Criminal offense similar to Section 175-177 of KUHP, which made the arrangements with the provisions of the grabdelicte and leichenfrevel, in Greece the threat is imprisonment of 2 (two) years. Heavy or light sanctions are applied for Criminal Acts of Religion and Religious Life in some countries, can not be released to the philosophy underlying the formulation of such offenses in their respective countries. In general, theocracy countries such as Pakistan, dropping a very heavy criminal offense to insult religious objects directly addressed to the Holy Scriptures, namely imprisonment for life, and the Prophet Muhammad, the death penalty or life imprisonment and a fine. While in Massachusetts, an affront to God, Jesus Christ, the Holy Spirit and the Holy Bible, punishable by imprisonment of 1 (one) year or a fine of 300 USD.

For Worship buildings and objects used in worship, then the compensation to victims in the form of restitution imposed on perpetrators and paid to the victim, or in the form of compensation by the state, the relevant victimologis applied, especially when seen from the perspective of victims of crime. The reason, of faith in God is the highest compared with the other subjects in all religious beliefs, and a review of aspects of who the victim, criminal contempt and incitement against God to deny God is greater, that is, every person who believes in Almighty God, of whatever religion. While contempt of Apostles, Prophets, Christ, Buddha, Avatara, or holy figures of religion in Indonesia, the Bible or Religious Worship, only hurt the religious feelings of the followers of the religion. While the "crime of broadcasting" *(verspreiding delict)* punished more heavily, which added a third from the penalty of the principal, because the insult through writing, drawing, or recording is more extensive and longlasting if compared with "*Begunstining delict".* Furthermore, compared to some countries, criminal sanctions for damage places of worship in Israel is the imprisonment of three (3) years, in India also punished with imprisonment of three (3) years or a fine or both, while in Pakistan, the sentences imprisonment of 2 (two) years or a fine or both. That does not apply only Majaphit imprisonment, a fine of 24,000 but *Pisis* and damage compensation payments, thus more fictimologis satisfy the justice of the perspective of the victim. Therefore, in this study criminal sanctions proposed destruction of places of worship imprisonment of 7 (seven) years, because this crime is "lex" of Article 410 KUHP are punishable by the imprisonment of 5 (five) years. Unlike the criminal damage buildings belonging to someone else, who became only the owner

of the newspaper building, but the destruction of places of worship victims were all bound by the same religious feeling of the place of worship were destroyed. In addition, if the damage resulted from an act of worship places, which can be dropped additional criminal restitution to repair the damage. If the actors are not really able to make restitution to the victim, then the state must provide compensation due to the occurrence of crime as a consequence of the state's duty to protect its people.

4. CLOSING

4.1. Conclusion

1. The norm formulation of "Crime offenses against Religion" are set out in Article 156a of KUHP be improved still too general and could be interpreted very broadly, because it needs to be specified to avoid religious persecution onjek be multitafsir. While the KUPH's article that can be categorized as "Crime offenses againts Religious Life", namely Article 175-177 (1) and (2); and 503 to-2, need to be improved, because of the influence of the regulation still put together with the provisions of grabdelicte and leichenfrevel, with regard to respect for the graves of the dead and their burial ceremonies.

2. In addition, the offense has not set destroying buildings and places of worship objects used for worship. Whereas, in the articles of the Criminal Code which can be categorized as "Crime offenses againts Religious Life", Section 175-177 which paragraph (1) and (2) and 503 to-2, needs to be refined, as the arrangement is still used one with the provisions of the *grabdelicte* and *leichenfrevel*, which deals with reverence to the graves of the dead and their burial ceremonies. In addition, the offense has not set destroying buildings and places and objects of worship, as it is set up in Pakistan, India, Israel, and the Law of Adigama from Majapahit.

4.2. Suggestions

In order to formulate norms and sanctions Crime againts Religion and Religious Life in the forthcoming National Penall Code of Indonesia *(Ius Constiendum),* the author recommends as follows:

1. Need reformulation of Article 156a (a) of KUHP into several chapters, namely: First, Crimes against religion in general (in some countries called *"Outrage to Religious Feeling and Insult to Religion"*), who object to offend religious person, shall be punished with imprisonment of 2 (two) years or a maximum fine of Category III. Second, the Religious Crimes against directly object directed against the principal teachings of religion (in some countries called *"Blasphemy"* or *"Godslastering"*), which is subdivided in 2 (two) chapters, namely: (1) An insult to God and sedition with the intention that other people do not believe in God, with a maximal imprisonment of 5 (five) years, and (2) an insult to the Apostles, Prophets, Christ, Buddha, Avatara, or holy figures of religion in Indonesia, or Scripture Worship religious, with a maximum imprisonment of four (4) years. Also, needs to be formulated in a separate articles containing offenses broadcasting *(Verpreiding delict)* from the previous three chapters containing crimes anyway *(Begunstining delict).*

2. Formulation in terms of sanctions, each object acts criminal adjusted humiliation, who is the victim, and the nature of the act is the danger to people's lives. In "The Crime offenses against Religion" , the blasphemy against God and incitement for denying the Lord in this study is proposed to be a separate article, distinguished by insulting the Apostle, Prophet, Christ, Buddha, Avatara, or holy figures of religious followed in Indonesia, the Scriptures, or religious worship, with more severe sanctions. While in "Crime againts Religious Life, a reformulation sanctions Section 175-177, as compared to other countries, sanctions are applied too lightly. Again, together with the criminalization of acts destruction of places of worship and objects used in worship as a separate criminal offense, the formulation of sanctions which better ensure fairness, both of the interests of the offender, the victim and the community.

BIBLIOGRAPHY

Ali, As'ad Said.*Negara Pancasila Jalan Kemashahatan Berbangsa* (Jakarta: LP3ES, 2009).

Arief, Barda Nawawi. *Kebijakan Hukum Pidana: Perkembangan Penyusunan Konsep KUHP Baru* (Jakarta: Penerbit Prenada Media Group, 2008).

Bruggink, J.J.H.*Refleksi tentang Hukum.*Alih Bahasa: Bandung: PT. Citra Aditya Bakti, 1999).

Bassiouni, Cherif. *Substantive Criminal Law* (Illionis, USA: Charles Thomas Publishers, 1978).

Darmaputra, Eka. *Pancasila: Antara Identitas dan Modernitas* (Jakarta: BPK. Gunung Mulia, 1987).

Dicey, A.V. *Pengantar Studi Hukum Konstitusi* (Bandung: Penerbit Nusamedia, 2007).

Dussich, J. "Concepts snd Forms of Victim Services", The Paper presented on 11th Asian Postgraduate Course on Victimology and Victim Assistance, in Indonesia University, Jakarta, July 22, 2011.

Ibrahim, Johnny. *Teori dan Metodologi Penelitian Hukum Normatif* (Malang: Bayu Media Publishing, 2008).

Kusuma, RM. A.B. *Lahirnya Undang-undang Dasar 1945* (Jakarta: Badan Penerbit Fakultas Hukum Universitas Indonesia, 2009).

Marzuki, Peter Mahmud. *Penelitian Hukum* (Jakarta: Kencana Prenada Media Group, 2005).

McLeod, Ian. *Legal Theory* (Macmillan: Palgrave, 2007).

Musa, K.H. Ali Maschan. "Diskursus Relasi Islam dan Politik di Indonesia", The Paper presented on ISCS's Seminar, in Denpasar, June, 1, 2008.

Notohamidjojo, O. *Soal-soal Pokok Filsafat Hukum* (Salatiga: Penerbit Griya Media, 2011).

Riana, I Ketut. *Kekawin Desa Warnana utawi Nagara Krtagama. Masa Keemasan Majapahit* (Jakarta: Penerbit Kompas, 2009).

Suherman, Ade Maman. *Pengantar Perbandingan Sistem Hukum* (Jakarta: CV. Raja Grafindo Persada, 2004).

Yamin, Yamin. *Tata Negara Madjapahit. Sapta Parwa.* Jilid IV (Djakarta: Penerbit Jajasan Prapantja, 1962).